NATIONAL POWER AND STATE INTERPOSITION 1787-1861.

FIFTY years have elapsed since South Carolina pretended to leave the Union. Looking over recent writings of northern men on the constitutional phase of that momentous event, one will find among their authors a strong disposition to throw up the whole case on the question of the legal rightfulness of secession. For this phenomenon four reasons may be assigned: (1) sheer human indolence; (2) the fact that the apologetic zeal of the conquered is notoriously apt to overbear the conciliatory complacency of the conqueror; (3) the fact that by a species of intellectual inertia the mind of the student is apt to yield itself in the case of questions of this class to the stronger speculative current which, in 1860, was with the South; (4) finally, the fact that the historical investigator of today is prone to regard questions of this sort as academic, though in fact they may involve, as this one does, some extremely interesting considerations of institutional origins and differentiations.

The basic foundation of all theories upon which secession proceeded, as well as of that doctrine which initially paralyzed the national government in dealing with it, was the doctrine that the "constitution was a compact of sovereign States." In no sense, however, was this the doctrine of the framers of the constitution. To their way of thinking the constitution was indeed a compact, but a compact entered into by the people of America, acting in original and creative fashion, an act of revolution, in other words, which was designed to give legal form to the already existing American nation. Nor did the constitution, in the thinking of the framers, leave the States "sovereign" in any genuine sense of the term. True, that description was often applied to the State governments, both during and after the Convention, to designate their corporate dignity, their autonomy, and finally their equality of representation in the new system. The State governments, however, were no parties to the constitutional compact, which was referred to a higher authority within the States, namely the People. But the people of a State was to the men of 1787 but part and parcel of the American people, and agent of the latter in adopting the constitution. Not till CALHOUN, who denied the existence in a political sense of the American people, and elevated the people of a State to the dignity of the highest political entity in the United States, was the term "sovereign" used in connection with that agency which had ratified the constitution.

Let us consider the attitude of the framers upon some of these topics rather more particularly. The first thing we discover is that some of the most influential members of the Convention, including KING, MADISON, and GERRY, deny specifically that even under the Articles of Confederation the States were genuinely sovereign. MADISON was particularly emphatic upon the point. "There is," he said, "a gradation of power in all societies, from the lowest corporation to the highest sovereign. The States never possessed the essential rights of sovereignty. These were always vested in Congress. * * * The States, at present, are only great corporations, having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederacy." Many years later MADISON, finding himself embarrassed by this language, charged YATES, who had published it from notes taken on the floor of the Convention, with gross misrepresentation, but as YATES' testimony on the point is substantiated by that of KING, and indeed by MADISON'S own notes, it is obviously to be preferred to that of MADISON writing in 1819. The chief defender of the notion of State sovereignty on the floor of the Convention was LUTHER MARTIN of Maryland, whose main proposition, however, seems to have been not that the States were sovereign under the Articles of Confederation, but because with the assembling of the Convention the confederacy had undergone dissolution.

But even when the adjective "sovereign" is used in connection with the States by the men of 1787, it is, as I have just pointed out, only with reference to the State governments, and never with reference to the people of the States, who indeed are conceived of as political entities in only a very negative sense, a sense moreover which tended to blend them always into simply "the People" anywhere and everywhere. The matter can be put in this wise: whereas today, principally I presume because of the machinery that since 1787 has come into general use for making and revising State constitutions, the "people of a State" appears as a real organ of the body politic, in 1787 "the people" were regarded for the most part in the negative light of the ultimate source of the governing power, which, however, at least until the next revolution, had passed from them forever. True, in the language of ELLSWORTH a "new set of ideas" was creeping in, which tended to give the term "people" as applied to the population of a State a more positive significance. At the time, however, there can be no doubt that Dr. JOHNSON, who presents the converse phase of the matter, was quite accurate when he found that the "States" were considered on the floor of the Convention in two senses: first, as "political societies," in which sense the evidence

is conclusive that they were identified with their governments; and secondly, "as districts of people composing *one* political society."

And to this "one political society" it is that the constitution was submitted for ratification. On this point HAMILTON'S language in FEDERALIST 22 is simply conclusive; while it also irradiates congenial light upon several allied topics. "It has not a little contributed," he writes, "to the infirmities of the existing federal system, that it never had a ratification by the *People.* Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers and has, in some instances, given birth to the enormous doctrine of legislative repeal. Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a *party* to a *compact* has a right to revoke that *compact,* the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of developed authority. The fabric of American empire ought to rest on the solid basis of the *Consent of the People.* The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority." Confirmatory of essentially the same point of view is the language of MADISON in FEDERALIST 39. It is true that MADISON here states that "ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong," and will therefore be a "federal act" rather than a "national" one, but it seems obvious that what he has in mind is the character of the act of ratification itself while in process of performance rather than the character to be imparted to it by the anticipated establishment of the constitution. For the final result is stated by MADISON at the opening of the same paragraph in the following words which are as unexceptionable as those of HAMILTON: "The constitution is to be founded on the assent of the people of America." Already, moreover, on the floor of the Convention in urging the reference of the constitution to State conventions, which he characterized as "agents," MADISON had set forth his views of the superior binding force of such ratification. "He considered," he said, "the difference between a system founded on the legislatures only and one founded on the people to be the true difference between a *league* or *treaty* and a *constitution.* * * * The doctrine laid down by the law of nations in the case of treaties is that a breach of any one article by any of the parties frees the other

parties from their engagements. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such interpretation." In order, therefore, to avoid the idea "that the articles of union were to be considered as a treaty, only of a particular sort, among the governments of independent States," and "the doctrine * * * that a breach of any one article by any one of the parties absolved the other parties from obligation" * * * "he thought it indispensable that the new constitution should be ratified in the most unexceptionable form and by the supreme authority of the people themselves."

But besides the necessity for the "most unexceptionable form" of ratification, MADISON and others also pointed out yet another reason for the kind of ratification which ensued, namely, the necessity of establishing the paramountcy of the new constitution to the State constitutions upon which, in many particulars, it made inroads. The paramountcy in question is of course stated in article six of the constitution, but the question still remains, upon what authority it was deemed to rest, what authority was deemed competent to support it. And the answer is, of course, the authority which was conceived as establishing the constitution, which is thus plainly designated as superior to the authority supporting a State constitution. Moreover this superior authority is named by the constitution itself in its opening phrase: "We, the People of the United States."

The notion of the constitution as a compact of the States was first broached in the Pennsylvania ratifying convention where it was met and disposed of by JAMES WILSON, as follows: "The *State governments* make a bargain with one another; that is the doctrine that is endeavored to be established by gentlemen in opposition; their *State sovereignties* wish to be represented! But far other were the ideas of this convention, and far other are those conveyed in the system itself." But not only did the friends of the constitution refuse to concede that the constitution was a compact of the States, but the enemies of the constitution found in the fact that it was not, one of the strongest reasons for opposition to its ratification. "It is, in its very introduction," wrote LUTHER MARTIN, the most philosophical of the opponents of the constitution, "declared to be a compact between the people of the United States, as individuals; and it is to be ratified by the *people* at large, in their capacity as *individuals;* all which * * * would be quite right and proper if there were *no State governments,* if all the people of this continent were in a *state of nature,* and we were forming one *national government for them as individuals.*"

The significance of this passage from the *Genuine Information* is

perhaps greater than is at first glance conveyed. In the first place, it brings out once more the identity that obtained in the minds of 1787, between a State in its political capacity and the government thereof. In the second place, it also brings out the correlative idea that the people of a State comprised so many individuals, merely inhabitants of a larger community, namely "America," "The American nation," or "The American Empire," according as we use one or other of the terms employed so often by the authors of the Federalist. But thirdly, it also brings forward the idea of the revolutionary character of the constitution. That the constitution comprised an act of Revolution was a constant charge of the opponents of its ratification. Nor were the advocates of the constitution able to gainsay this charge, even had they been disposed to do so. But they do not seem to have been so disposed, for on the floor of the convention, at least, the idea of Revolution was accepted in the frankest possible manner with all its implications. This fact comes out best, perhaps, in connection with the discussion as to how many ratifications should be required to set the new system in operation. The convention "must be said in this case," WILSON declared "to go to the original powers of society," or as KING put it later, to represent "a recurrence to first principles," which, in the political terminology of 1787, meant neither more nor less than revolution. Moreover from this same idea as the obvious premise of his thought, MADISON proceeded to derive the most terrific consequences, unless these should be obviated by the plain terms of the constitution. "The constitution as it stands," he declared, "might be put in force over the whole body of the people though less than a majority of them should ratify it." In other words, the competence of the power standing back of and ordaining the constitution was, so far as existing institutions were concerned, absolutely unlimited and irresistible. Moreover, that competence was represented by the convention itself, with whom alone it rested to specify how many ratifications should be required to set the new system into operation, and whether such ratifications should implicate the whole American people or only such portion of them as resided within the States rendering ratification. WILSON, it is true, dissented from MADISON'S view, but KING, who had earlier expounded the idea that the people of the several States had been merged into one people under the Articles of Confederation, concurred with him, with the result that in the final form the constitution stipulated specifically that its ratification by the conventions of nine States should be sufficient for its establishment "between the *States so ratifying*," that is, between those only.

To its framers, therefore, the constitution meant what it says: it

rested—to quote the language of one of its opponents, RICHARD HENRY LEE,— upon the ordination, "not of the people of New Hampshire," etc., but upon that of "the people of America;" it was a compact among the people of the United States, to whom it gave legal form and semblance; and while the people of America acted, at one stage in the process of establishing the constitution, through the medium of conventions chosen by the people of the States, each of these conventions,—like the general convention which preceded them,—derived its competence, which was the transcendent competence of revolution, not from the source of its immediate appointment, which had never borne sovereignty nor indeed had ever had sovereignty attributed to it, but from its ulterior agency for the People of the United States. But let us go a step further and inquire, what qualities the framers of the constitution intended to impart to the government thus founded upon the ordination of the people of the United States. First and most important was this quality: it was to be a government over individuals between whom and itself the States were to have no faculty whatsoever of intervening. For the framers had no other object half so much at heart as to be rid once and forever of that State intervention which had made the Confederacy a sham and a mockery. But suppose the national government should abuse its powers, would not the States then have the right to intervene to protect its citizens? No; for though it was recognized as sheer matter of fact that the State governments might on occasion become centers of resistance to the national government, the only right recognized in the case of an abuse of power by the national government was the right of the people of the United States to oppose it by the same means as those which the people of a State would have the right to use in case the government of that State abused its power. Such means would embrace for example, a resort to the right of petition, to the ballot, and ultimately to the right of revolution. Such is plainly MADISON'S point of view in the FEDERALIST, and the same point of view is again revealed by the Virginia ratifying convention. That body adopted the following oft-quoted and as often misinterpreted declaration: "We, the delegates of the people of Virginia * * * do in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the constitution, being derived from the people of the United States, may be resumed by them whensoever the same shall be perverted to their injury or oppression." To cite this declaration as an assertion of the right of secession or indeed of any kind of State intervention is simply absurd. It is a plain statement of the current

doctrine of the right of revolution, which right in this particular case is conceived as belonging to the people of the United States.

But the right of revolution was never, either in 1787 or even in 1776, conceived of as an absolute right. Whether indeed it was a right at all was always contingent, in the theory of the matter, upon whether it had back of it power adequate to make it good. In other words the obverse of the right of revolution was always recognized to be the right of the authority revolted against to resist revolution. And so it was in this case; the government to be established by the constitution would have, it was recognized, the right of self-preservation. The first consideration to be adduced in support of this proposition is the fact that the members of the convention were constantly referring to their tasks as one to be discharged for "ages to come," or in similar phrase. True, at one stage of the convention when the controversy between the large and small States was at its bitterest, and conflict of interests between North and South and East and West had come to light, there were some, notably GORMAN of Massachusetts, who had despaired of forming a lasting union. But this very despair was index to that desire which finally furnished the constitution with its intention. In the second place, moreover, the opponents of the ratification of the constitution used essentially the same language, though with contrary intent, warning their fellow-citizens that once the "yoke" of the constitution was assumed, it was assumed "forever." But thirdly, the framers of the constitution took every precaution that was necessary from their point of view to furnish the national government with the *means* of self-preservation. In this connection three clauses of the constitution claim our attention: First, the clause defining "treason" against the United States; secondly, the clause authorizing the President to call forth the militia to suppress "insurrection;" and thirdly, the clause authorizing Congress to "pass all laws necessary and proper for *carrying into execution* the foregoing powers."

The debate on the subject of treason occurred August 20. Article seven of the Report of the Committee on Detail contained the following clause: "Treason against the United States shall consist only in levying war against the United States or any of them. * * * The legislature of the United States shall have power to declare the punishment of treason." GOUVERNEUR MORRIS was displeased with these provisions. He "was for giving the Union an exclusive right to declare what should be treason. In case of a contest between the United States and a particular State," he pointed out "the people of the latter must, under the disjunctive terms of the clause, be traitors to one or other authority." To this practical argument Dr. JOHNSON

of Connecticut added a theoretical one: "Treason could not be both against the United and the individual States, being an offence against the sovereignty, which can be but one in the same community." Upon motion by WILSON and JOHNSON, accordingly, the phrase "any of them" was stricken out of Article seven without a dissenting vote. However, as MADISON pointed out, the article still left it with the States to define treason against themselves. But said JOHNSON, "There can be no treason against a particular State; it could not even at present as the Confederacy now stands; the sovereignty being in the Union; much less can it be under the proposed system." JOHNSON, therefore, and KING now set to work to make the constitutional definition of treason exclusive, first by striking out "against the United States" after the word "treason" in Article seven and then by inserting the word "sole" in front of the word "power." But at this stage another view of the matter, represented particularly by ELLSWORTH and MASON, began to find expression; the view, namely, that whereas the United States would be sovereign "on one side of the line," on the other side the States would be sovereign. By the final disposition of the matter, therefore, while the concept of treason against a State was denied any place in the constitution by unanimous vote of the Convention, by the close vote of six States against five, the power was still left the States of defining treason against themselves individually. But the point of view from which this concession to State pride was made is plainly indicated by ELLSWORTH who was primarily responsible for it: "There can be," he urged, "no danger to the general authority from this; as the laws of the United States are to be paramount."

Equally instructive in the intentions of the Convention was the failure on August 30, of an attempt of the States-Rights contingent to eliminate from what is today Article four, Section four, of the constitution, the phrase "domestic violence" and to substitute therefor the term "insurrection" of the militia clause. The purpose of the attempt is of course palpable: it was to confine, at least by implication, the right of the national government to use the militia, to cases where application came from the State authorities themselves for military aid. But as DICKINSON had already pointed out, the State legislatures might be the very source of the mischief; and the attempt was voted down. The deduction is obvious and indeed is stated by the constitution itself; the Convention intended that the national government should have within the sphere of its competence all the powers "necessary and proper" for executing its mandates, a powerful executive, a complete system of courts through which it would judge finally of the scope of its own authority, the power of

raising and supporting an army and navy, the power of calling forth its able bodied citizenship to suppress insurrection, the power of suspending the writ of habeas corpus in case of insurrection, the power of reaching anywhere and everywhere within the national boundaries those who forcibly resisted its laws and punishing them as traitors. In short, it was to be vested executively with full territorial sovereignty.

And thus we are brought to consider the subject that troubled President BUCHANAN and his associates so greatly in early December of 1860, namely State coercion. Upon this subject the point of view of the Convention of 1787 was, for all purposes of this discussion, set forth quite adequately by ELLSWORTH in the Connecticut ratifying convention in the following words: "The coercive principle is necessary for the Union; the only question is, shall it be a coercion of law or a coercion of arms? There is no possible alternative. Where will those who oppose a coercion of law come out? Where will they end? * * * This constitution does not attempt to coerce sovereign bodies, States in their political capacity. No coercion is applicable to such bodies but that of an armed force. If we should attempt to execute the laws of the Union by sending an armed force against a delinquent State, it would involve the good and bad * * * in the same calamity. But legal coercion singles out the guilty individual and punishes him for breaking the laws of the Union." This passage is the most pronounced and clear cut of any I have come upon, dealing with its subject-matter. The only question is whether it is not too *much* so. Undoubtedly the Convention of 1787 designed to obviate all necessity for State coercion, which had proved ineffectual under the Articles of Confederation. Undoubtedly, too, it thought it had succeeded in its design by making the national government a government over individuals, that is, a government of laws. This the passage above quoted establishes perfectly. What it does not establish is the proposition later deduced from it and similar passages, that the Convention absolutely closed its eyes to all possibility of a collision between the States and the national authorities and therefore conferred upon the latter no power to deal with a situation arising out of unwarranted pretensions of the former. Of the falsity of this proposition, the utterances of GOUVERNEUR MORRIS and DICKINSON, cited above, and the votes that ensued upon them, afford completest proof. Still, making this due qualification, ELLSWORTH'S words set forth the general point of view of the Convention both vividly and truthfully, instigating inevitably the inquiry as to how the design of the constitutional fathers had been so far overturned by 1860 that it had come to be thought neces-

sary to raise again the question of State coercion. The answer to this inquiry is not far to seek: The States, deposed by the constitution of 1787 from their position of mediation between their citizens and the central government, but left so strong in other respects by the constitution as to become the natural rallying points of opposition to national policies, had by 1860 succeeded to greater or less extent in assuming once more, in the constitutional thinking of the time, that earlier position of mediation. And, by the same token, naturally, even those who saw clearly in 1860 that the States had constitutionally no such function of mediation, yet hesitated to urge upon the national government a course that would bring it into collision with State authorities, a possibility which, despite the action of JACKSON in 1833, they insisted did not fall within the contemplation of the constitution.

And so we return to our starting point, the noxious doctrine, namely, that "the constitution was a compact of sovereign States." The documentary source of this idea, at least in the history of the mischief it worked, was the Virginia Resolution of 1798, of which the author was JAMES MADISON, though the Jacob of the transaction was THOMAS JEFFERSON. The important resolution is the third, which reads as follows: "Resolved * * * that this assembly (namely the Virginia legislature) doth explicitly and peremptorily declare that it views the powers of the federal government as resulting from the compact to which the States are parties * * * that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the States who are parties thereto have the right and are in duty bound to interpose for arresting the progress of the evil and for maintaining within their respective limits the authorities, rights and liberties appertaining to them." The essential ideas here are two: First, the idea of the constitution as a compact of the States, and secondly, the derivative idea of the right and duty of the individual States under the constitution to interpose the shield of their sovereignty on occasion, between their respective citizens and the national government. Years later MADISON was at great pains to show that he was laying claim in 1798 only to a quasi-revolutionary right to be exercised by the whole body of States. But if interposition was a mere revolutionary right, why base it upon the alleged character of the constitution as a compact of the States; and if it was a right to be exercised by the whole body of States, why the word "respectively" in the above passage? But there is also another circumstance equally fatal to MADISON'S disingenuous attempts to escape responsibility for his rash facility. While these resolutions were pending, MADISON was in correspond-

ence with BRECKENRIDGE of Kentucky who, also in association with JEFFERSON, was promoting similar doctrine in that Commonwealth. The subject of this correspondence was whether the proper constitutional agency for the promulgation of the resolutions in question was the State legislature or a constitutional convention. MADISON urged that it was the latter, because constitutional conventions in the States had originally ratified the constitution, but BRECKENRIDGE was confident that it was the former, inasmuch as it was with its legislature that the State's sovereignty reposed. The purport of this correspondence is obvious: it shows the anxiety of its authors to present their doctrine as correct constitutional doctrine, and the difficulty in the way of their doing so because the recognized organ of the State's sovereignty, even in 1798, was other than the organ through which the constitution had originally received ratification within the State.

On the other hand, it must be said, in justification of MADISON, that as early as 1800 he had begun to reconsider his position and to seek retreat from it. For being communicated to the sister States, the resolutions from Virginia, together with resolutions of a similar character from Kentucky, had drawn forth from the northern legislatures responses which reiterated the doctrine of MADISON himself, in FEDERALIST 39, namely that the final interpretation of the constitution lay with the national judiciary. In his report to the Virginia legislature in 1800, therefore, MADISON is forced to confront the question of where the power to interpret the constitution with ultimate legal authority really rests. He begins by reiterating the view set forth in the resolutions: The States are sovereign, any decision of the federal judiciary therefore, while possibly ultimate in relation to the authorities of the other departments of the federal government, can not possibly be so "with relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts." Fifty pages along, however, MADISON'S audacity has oozed entirely away. "It has been said," he writes, re-stating the issue, "that it belongs to the judiciary of the United States and not the State legislatures to declare the meaning of the federal constitution. But," he urges in a far different tone to the one with which he set out, "a declaration that proceedings of the federal government are not warranted by the constitution is a novelty neither among the citizens nor among the legislatures of the States * * * nor can the declarations of either, whether affirming or denying the constitutionality of measures of the federal government, be deemed, in any point of view, an assumption of the office of judge. The declarations in such cases are expres-

sions of opinion, unaccompanied with any other effect than what they may produce on opinion by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force." What a tremendously lame conclusion to so much fulmination! The boasted right of the sovereign State to insert itself between its citizenship and the national government, on such occasions as it deemed the latter to be exceeding its powers dangerously, comes down to a mere right on the part of its legislature to vote resolutions expressive of opinion, resolutions which in the last analysis are no more authoritative than any ebullition of opinion on the part of a group of citizens congregated of a Saturday night in a cross-roads grocery store.

But at any rate, MADISON had constructed a bridge of retreat from the position in which the Resolutions of 1798 had landed him. Unfortunately, the same bridge afforded to others less timid, less scrupulous than himself, and less bent upon keeping the cake they fain would eat, an easy means of approach to the abandoned position, which—to continue the figure—now became a veritable pirates' den of destructive speculation. Between the Resolutions of 1798 and CALHOUN'S theorizing a generation later, three developments occurred in the field of American constitutional doctrine which were of the utmost importance: First, the theory of the social compact underwent a serious decline in reputation; second, the notion of sovereignty which ROUSSEAU offers as the ultimate indivisible will of a community came into wide acceptance: thirdly, in consequence particularly of the rise of the State constitutional convention, the notion of the "people" as the highest political embodiment of the State and the residence of its sovereignty became common property. Of all these notions, with their novel and bright definiteness, CALHOUN proceeded to make dextrous appropriation, while MADISON, upon whom he endeavored to fasten the paternity of his ideas, bitterly warned his countrymen against "those errors which have their source in the innovations wrought by time upon the meaning of words and phrases." So far as CALHOUN at least was concerned this warning fell upon utterly deaf ears. The constitution, therefore, he proceeded to write down a *mere* compact and the parties to it as *absolutely* sovereign and so controlled by it only to such degree as they might in their infinite discretion at any moment individually decide. Finally, the organ of that sovereignty which *eo nomine* he found attributed to the State in 1787, but which in fact was a far different sort of sovereignty to that of his speculation, he asserted to be the State convention; and the State convention, summonable by the legislature at will, he asserted to be the identical organ which,

summoned at the behest of the convention of 1787, had originally ratified the constitution. Little wonder that it irked MADISON to be made sponsor for this ridiculous parcel of puns, pseudo-philosophy and falsified history. Yet it is undeniable that he gave CALHOUN the one essential idea to which all the latter's absurd theory-monging afforded but a newly framed supporting scaffold, the idea namely of State interposition,—the idea that for some reason or other the State had the right, either in constitutional crises to be judged of by itself, or at its own sweet will, to step between citizens of the United States and the government of the United States, when such citizens happened to be, in another relationship, their own citizens too. This is the idea that lies back, not only of CALHOUN'S theory, but of all theories of secession; of all theories, in other words, which sought to impart to rebellion a false glamour by associating with it the States in their political capacity.

Nor even is this the full toll of MADISON'S responsibility. For it is to him also that were ultimately due those singular contradictions of thinking which at first threatened to paralyze the national authorities indefinitely in dealing with the situation confronting it in December, 1860. As evidence of this paralysis, though it proved only temporary, we have two famous documents: First, Attorney General BLACK'S opinion of November 20, 1860, written in response to a series of questions by President BUCHANAN, as to the legal means at his disposal in executing the laws of the United States in face of forcible resistance within the States; and secondly, the presidential message of December 3, following, dealing with the question of the right of secession and the subject of State coercion. As I have just stated, the remarkable feature of these documents is the singular contradiction of thought to be found running through them, a contradiction due entirely and exclusively to an endeavor to harmonize the true concept of the national government as a government over individuals, supreme and uncontrollable within the sphere of its powers, with the Madisonian theory of 1798, which in the last analysis left the national government without territorial authority save at the sufferance of the States.

Let us consider first the attorney-general's opinion. At the very outset BLACK reveals an equivocal attitude on the crucial question of secession, for while stating the correct doctrine that "the will of a State, whether expressed in its constitution or laws, cannot * * * absolve her people from the duty of obeying the just and constitutional requirements of the central government," he introduces after the word "cannot" the invidious qualification, "while it remains in the Confederacy." The same fatal point of view again emerges

when he comes to construe the act of 1795, authorizing the President to call forth the militia, "whenever the laws of the United States shall be opposed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals." His main proposition in this connection is that if the federal civil service be once expelled from a State it cannot, under "existing law," be restored by military force. "Under such circumstances, to send a military force into any State with orders to act against *the people* would be simply making war upon them." Nor apparently was this supposed defect of the national executive power due merely to "existing law:" it was grounded in the constitution itself. The language in which BLACK states the issue is itself significant: "Whether Congress has constitutional right to *make war against one or more States* and require the exercise of the federal government to carry it on by means of force to be drawn from other States." The fatal idea of interposition lurks in every word of this sentence, as it does also in every turn of the argument that follows upon it. For the attorney-general proceeds to argue that Congress has no such power expressly given it, "nor are there any words in the constitution which imply it." It has indeed a power to declare war, but the kind of war contemplated is foreign war. It also has the power to provide for calling forth the militia, "and *using them within the limits of the State.*" But this power can be exercised only in aid of federal officers "in the performance of their regular duties," or to repel invaders from the State, or "to suppress insurrection against the State," where "the State herself shall apply for assistance against her own people." In short, he confines the power of the federal government in the use of militia to its use within the State from which it is called forth, and he translates the word "insurrection" of Article one, Section eight, of the constitution into the term "domestic violence"; of Article four, Section four—substantially the very thing the Convention of 1787 had refused to do. Finally, he reveals once more his point of view, in the remarkable dictum, that "all these provisions" which he is engaged in construing "are made to protect the States." Harmoniously with this marvelous train of exegesis by interpolation, any exertion of military force by the federal government within a State, save within the limitations he prescribes, takes on in his eye the character of a "war against" such State, effecting its "expulsion" from the Union.

Not essentially different is the process of thought revealed in President BUCHANAN'S message of December 3, 1860. In its statement of the doctrine of the permanency of the Union, this document

is thoroughly admirable. It is better formulated and more effective at this point than LINCOLN'S later utterances upon the same topic, which indeed owe not a little to it. "That the Union was designed to be perpetual," it proceeds, "appears conclusively from the nature and extent of the powers conferred by the constitution on the federal government. These powers embrace the very highest attributes of national sovereignty. * * * This government, therefore, is a great and powerful government, invested with all the attributes of sovereignty over the special subjects to which its authority extends. Its framers never intended to implant in its bosom the seeds of its own destruction, nor were they at its creation guilty of the absurdity of providing for its own dissolution. * * * They did not fear, nor had they reason to imagine, that the constitution would ever be so interpreted as to enable any State by her own act, and without the consent of its sister States, to discharge her people from all or any part of the federal obligations. * * * In short, * * * secession is neither more nor less than revolution. It may, or it may not be, a justifiable revolution; but still it is revolution." So far, very excellent; to this language no exception need have been taken, save perhaps at one or two minor points, by the strictest nationalist.

It is only when President BUCHANAN proceeds to inquire into the question of power that the presence of incompatible elements in his system of constitutional doctrine appear distinctly. The President's sworn duty, he states, is of course to execute the laws, but, he continues, "this duty cannot" under existing statutes "by possibility be performed in a State where no judicial authority exists to issue process, and where there is no marshal to execute it, and where, even if there were such an officer, the entire population would constitute one solid combination to resist him." True, the same objections did not lie in the way of executing the laws for the collection of the customs. The revenue still continued to be collected, as heretofore, at the custom-house in Charleston, and should the collector unfortunately resign a successor might be appointed to perform this duty. Also, as to the property of the United States in South Carolina, "it was not believed that any attempt would be made to expel the United States from this;" "but if in this I should prove mistaken, the officer in command of the forts has received orders to act strictly in the defensive. In such a contingency, the responsibility for consequences would rightfully rest upon the heads of the assailants." Here, plainly, is Attorney-General BLACK'S main proposition over again, namely, that the national government, once expelled from a State, could not return thither with such force as might be necessary

to secure its reinstitution; minus, however, BLACK'S admission that it could *probably* recapture property unlawfully taken from it.

And when he passes to consider Congress' powers in the premises, President BUCHANAN still cleaves to his adviser, though translating BLACK'S phrase, "waging war upon a State" into the phrase "coercing a State." For he asserts the question before Congress to be the question whether it possesses "the power by force of arms to compel a State to remain in the Union" or, in other words, the question whether the constitution has "delegated to Congress the power to coerce a State into submission, which is attempting to withdraw or has actually withdrawn from the Confederacy." The most notable thing about this question is the way in which, in its assumption of the possibility of secession, it appears to contradict all that its author has just said in denial of the right of secession. But the next most notable feature of it, is its obvious intent of trapping a negative answer. On this point, BUCHANAN'S biographer CURTIS has endeavored to show that all that BUCHANAN had in mind in putting the question was to deny to Congress the right to intervene beforehand to prevent State authority from putting through an ordinance of secession in accordance with what they considered the due forms. This apology can scarcely pass muster, for three reasons: In the first place, the kind of coercion which it alleges BUCHANAN to have been discussing was never demanded by anybody, and therefore to have discussed it would have been perfectly gratuitous and indeed silly; in the second place, the distinction upon which the apology rests arose only subsequently to the message of December 3; and in the third place, the answer which BUCHANAN himself gives to his question precludes any such construction being put upon it. For that answer is couched in the following words: "Congress possesses many means of preserving it (the Union) by conciliation, but the power of the sword was not placed in their hands to preserve it by force,"—a statement of the matter which, at least when taken with the entire context of the message, demonstrates beyond a doubt that BUCHANAN was canvassing the whole question of Congress' powers in dealing with a case of pretended secession and the situation arising therefrom.

Thus, what the total doctrine of BUCHANAN'S message amounts to is this: A State cannot constitutionally withdraw from the Union, but if it pretends to do so, its unconstitutional act has the constitutional effect of cutting off the national government from all contact with the citizens of such State,—in other words, precisely the constitutional effect that it would have had, had it been a constitutional

act. Fortunately, we are not left in the dark as to the fountain head of this muddled doctrine and halting imbecility. It is "Mr. MADISON'S justly celebrated report" to the Virginia legislature, and the "resolutions of the preceding legislature." Also, it is BUCHANAN'S own construction of a "brief but powerful speech," in which "Mr. MADISON opposed" a proposition before the Convention of 1787, to authorize "an exertion of the whole against a delinquent State." This speech ran as follows: "The use of force against a State would look more like a declaration of war than an infliction of punishment. and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound." What BUCHANAN forgets is, that in the face of this sentiment MADISON advocated from the opening to the close of the Convention, and even after its adjournment, that the national legislature be given a power of direct veto of State legislation. True, this idea was not accepted; instead, the function of keeping State legislation within constitutional bounds was handed over to the national judiciary, whose mandates are enforceable, in the first instance, against individuals. But what was the right and duty of the national government in case a State should resist its judicial mandates was plainly indicated by MADISON himself in 1809, when in response to protests by the legislature and governor of Pennsylvania against the recent decision of the supreme court in *United States* v. *Peters,* he gave solemn warning of "the awful consequences" that must ensue in the event of any attempt on the part of that commonwealth to prevent the enforcement of such decision. "Continue to execute all the express provisions to our national constitution," said LINCOLN in his first inaugural, "and the Union will endure forever." Such plainly was the point of view of MADISON, President of the United States, and such, it may be urged with confidence, was the point of view of the Convention which framed the constitution. It was BUCHANAN'S and BLACK'S misfortune in December, 1860, that instead of resorting to the true and authoritative sources of constitutional construction, they pinned their faith upon the unsuccessful views of a protesting minority,—views that had been framed largely for political effect under the brilliant but irresponsible direction of an opportunist doctrinaire.

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